

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 188

Docket No. DE-0752-08-0432-I-1

**Jose Tardio,
Appellant,**

v.

**Department of Justice,
Agency.**

September 23, 2009

Elwyn F. Schaefer, Esquire, Denver, Colorado, for the appellant.

Rhonda Rhodes, Esquire, Englewood, Colorado, for the appellant.

Sandy B. Reinfurt, Esquire, Falls Church, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has filed a petition for review (PFR) and the appellant has filed a cross PFR of an initial decision (ID) that found that the appellant had been constructively suspended and ordered cancellation of that action. For the reasons set forth below, we GRANT the agency's PFR under [5 C.F.R. § 1201.115](#), DENY the appellant's cross PFR, REVERSE the ID, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant was employed as a GS-11 Interpreter with the agency's Executive Office for Immigration Review, at the Denver Immigration Court (Court) in Denver, Colorado. *Tardio v. Department of Justice*, MSPB Docket No. DE-0752-07-0149-I-1, Initial Appeal File (Removal IAF), Tab 4, Subtab 4a1. On April 18, 2003, he filed a claim for benefits with the Office of Workers' Compensation Programs (OWCP), Department of Labor (DOL) due to pain in his back and shoulder areas caused by his repetitive work activities. *Id.*, Subtab 4o at 2. The appellant asserted that his disabling injury began on October 19, 2001. *Id.* DOL initially denied his claim; however, after several cycles of review and reconsideration, in addition to medical reports and second opinion examinations, OWCP issued a decision on July 24, 2006, finding that the appellant had a covered injury and was entitled to temporary wage-loss benefits commencing April 20, 2005, *id.* at 7, the date that the appellant's treating physician, Lynn Parry, M.D., issued a medical report taking the appellant off work "for at least the next 6-8 weeks" due to the following medical conditions: cervical strain, secondary to repetitive use; bilateral shoulder impingement; bilateral medial and lateral epicondylitis; bilateral cubital tunnel syndrome; and bilateral carpal tunnel syndrome. Removal IAF, Tab 6, Subtab 4aaa at 4-5.

¶3 In a medical report dated May 18, 2005, Dr. Parry concluded that the appellant would not be returning to work "for at least two [more] months." Removal IAF, Tab 6, Subtab 4yy at 3. On June 14, 2005, the appellant requested by e-mail that the agency place him "on leave without pay [LWOP] until further doctor [sic] order." *Id.*, Subtab 4ww. The agency approved the appellant's request on June 15, 2005. *Id.*

¶4 In August 2005, Dr. Parry released the appellant to return to work but with medical restrictions. Removal IAF, Tab 6, Subtab 4vv. In particular, Dr. Parry stated that the appellant could do only oral translation and could not use his upper

extremities at all. *Id.* She also specified, “No filing, no keyboard, no data entry.” *Id.*

¶5 In a memorandum to his supervisor, Court Administrator Alec Revelle, dated August 25, 2005, the appellant asked the agency to “accommodate” his medical condition by providing him a “permanent light duty position within the restrictions defined by Dr. Parry.” *Tardio v. Department of Justice*, MSPB Docket No. DE-0752-08-0432-I-1, Initial Appeal File (IAF), Tab 9, Exhibit B.

¶6 In his September 7, 2005 response, Mr. Revelle denied the appellant’s request, notifying the appellant that a permanent light duty position with the Court did not exist and asking the appellant for additional medical information from Dr. Parry about his condition and limitations, including a detailed written prognosis as well as recommendations regarding modifications and/or accommodations at the workplace that would help the appellant perform the essential duties of his Interpreter position. IAF, Tab 9, Exhibit C.

¶7 In her September 26, 2005 response to Mr. Revelle’s September 7, 2005 letter, Dr. Parry recommended that the appellant return to work doing only verbal translation and without doing any upper extremity work for the first three weeks. IAF, Tab 9, Exhibit D at 1. Dr. Parry specified that “[t]his would mean complete avoidance of data entry, filing or hole punching.” *Id.* She further recommended that the appellant should be limited to a maximum of one-half hour per day of repetitive work using either the wrists or elbows, and no lifting or filing for more than two hours per day. *Id.* at 2. In addition, she stated that the appellant should work no more than six hours per day, three days per week for the first month after his three-week introduction, then four hours per day three days a week for the first month, and then six hours a day three days a week for the next month, at which time he should be reevaluated for “continued progression and advance.” *Id.*

¶8 In an October 17, 2005 letter, Mr. Revelle advised the appellant that the agency was unable to return him to work under the restrictions set out by Dr.

Parry, as there was “no position that would allow [the appellant] to do only ‘verbal translating’ even on a limited schedule such as that recommended in Dr. Parry’s letter.” IAF, Tab 9, Exhibit E at 1. In addition, Mr. Revelle informed the appellant that his sick leave and annual leave balances were zero and, therefore, he would remain in a LWOP status until his OWCP claim was decided or the agency received information that he had recovered sufficiently to return to work. *Id.*

¶9 In a November 1, 2005 letter received by the agency on or about November 18, 2005, OWCP indicated that the appellant’s “repetitive motion” syndrome had not been accepted as a work-related injury. Removal IAF, Tab 6, Subtab 4nn.

¶10 On November 29, 2005, Mr. Revelle informed the appellant that OWCP had denied his medical claim and advised him that, in light of OWCP’s decision, he must request leave for further absences to avoid the possibility of being recorded as absent without leave (AWOL). Removal IAF, Tab 6, Subtab 4mm.

¶11 In his e-mail response dated December 1, 2005, the appellant asserted that neither he nor his attorney had received any notification regarding the outcome of his OWCP case and that he should therefore continue on LWOP pursuant to Mr. Revelle’s October 17, 2005 letter. IAF, Tab 9, Exhibit I. Specifically, the appellant stated: “Until there is official notification to the contrary, my OWCP case is still pending and your demands [that I request leave] are premature.” *Id.*

¶12 In a December 7, 2005 letter, Mr. Revelle notified the appellant that, as of that date, he had been charged six days of AWOL for his absences because he had not complied with the leave requesting procedures outlined in Mr. Revelle’s November 29, 2005 letter. IAF, Tab 9, Exhibit M. In addition, Mr. Revelle reiterated that the agency could not return the appellant to employment doing only “verbal translating” as recommended by Dr. Parry. *Id.*

¶13 In his December 9, 2005 response to Mr. Revelle, the appellant stated, “by your own written instructions of 10/17/05, I was to ‘remain in a leave-without-pay status until such time as your [OWCP] claim is decided or the Agency

received information that you have recovered sufficiently to return to work.’ You cite in your correspondence of 11/29/05 a decision in my OWCP case, which has proven incorrect.” IAF, Tab 9, Exhibit N. The appellant requested that the agency place him back on LWOP immediately and change his absences that had been reported as AWOL to LWOP, per Mr. Revelle’s October 17, 2005 letter, because “as yet there is no resolution of my case with OWCP and there is no reasonable accommodation so that I can return to work.” *Id.*

¶14 On December 30, 2005, the appellant filed a formal equal employment opportunity (EEO) complaint in which he alleged that the agency denied him reasonable accommodations for his disabilities and placed him on AWOL status as of December 1, 2005, due to his race (Hispanic), national origin (Peruvian), and disability (physical). IAF, Tab 9, Exhibits G, H, O, R.

¶15 On January 31, 2006, Anne J. Greer, Assistant Chief Immigration Judge, issued a notice proposing to remove the appellant for medical inability to perform the duties of his position since April 20, 2005. Removal IAF, Tab 5, Subtab 4bb. The notice of proposed removal stated that the appellant’s “present duty and pay status are not affected by this letter.” *Id.* at 3. The appellant remained in an AWOL status until the effective date of his decided removal, December 9, 2006. IAF, Tab 7, Exhibit 1, Tab 9, Exhibit L; Removal IAF, Tab 4, Subtabs 4a, 4c, Tab 5, Subtabs 4x, 4bb.

¶16 On January 8, 2007, the appellant filed an appeal of his removal with the Board. Removal IAF, Tab 1. On October 29, 2007, the administrative judge (AJ) issued an ID that dismissed the appeal without prejudice pending the results of the appellant’s application for a disability retirement annuity with the Office of Personnel Management (OPM). Removal IAF, Tab 29. On or about March 27, 2008, OPM granted the appellant’s disability retirement application, and the appellant timely refiled an appeal of his removal with the Board on April 14, 2008. *Tardio v. Department of Justice*, MSPB Docket No. DE-0752-07-0149-I-2, Initial Appeal File (Removal Second Appeal File), Tab 1.

¶17 On June 9, 2008, the Equal Employment Opportunity Commission (EEOC) judge presiding over the appellant's formal EEO complaint granted the agency's motion to dismiss the appellant's claims relating to his leave status because they were pending before the Board as part of his removal appeal. IAF, Tab 9, Exhibits S, T. On June 30, 2008, the appellant filed prehearing submissions in the removal appeal and raised the issue of his leave status originally raised with the EEOC. *Id.*, Exhibit U at 7.

¶18 During proceedings in the appellant's removal appeal, the AJ determined that the appellant's claim about how the agency handled his leave status appeared to be a matter appealable to the Board. IAF, Tab 9, Exhibit V. Therefore, pursuant to *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985), the AJ issued a jurisdictional order dated July 17, 2008, in which she advised the appellant of the legal standards for asserting a constructive suspension claim and directed the appellant to notify her if he intended to assert a claim of constructive suspension. *Id.* at 2-3.

¶19 In his July 21, 2008 response, the appellant notified the AJ that he intended to present such a claim. IAF, Tab 9, Exhibit W. The AJ then issued a show cause order in which she: advised the appellant that his July 21, 2008 submission contained "insufficient detail" to allow her to make a jurisdictional ruling on his constructive suspension claim; reiterated the legal standards for asserting a constructive suspension claim; advised the appellant that there is an issue of timeliness with respect to the filing of his constructive suspension claim; and ordered the appellant to file evidence and argument regarding the issues of timeliness and jurisdiction.¹ IAF, Tab 2. Both parties filed responses, with the agency moving to dismiss the constructive suspension claim for lack of jurisdiction and untimeliness. IAF, Tabs 4, 9, 10. In his response, the appellant asserted the affirmative defenses of: discrimination based on his color, race, and

¹ The AJ issued a more detailed order on timeliness on August 19, 2008. IAF, Tab 5.

national origin; retaliation for prior protected activities; and disability discrimination based on failure to accommodate and disparate treatment. IAF, Tab 4 at 6-9; Removal Second Appeal File, Tab 48.

¶20 On October 2, 2008, the AJ found that the appellant made a nonfrivolous allegation of Board jurisdiction regarding his claim of constructive suspension, thereby entitling him to a hearing, and she joined this appeal for hearing purposes with the appellant's appeal of his removal and his restoration appeal, *Tardio v. Department of Justice*, MSPB Docket No. DE-0752-07-0149-I-2, and *Tardio v. Department of Justice*, MSPB Docket No. DE-0353-08-0495-I-1. IAF, Tab 12.

¶21 After a hearing, the AJ found that the appellant "timely filed" this appeal and that the agency had constructively suspended the appellant from August 25, 2005, to his December 9, 2006 removal. IAF, Tab 13 (ID) at 1, 4-10. She reversed the agency's action because she found that the agency did not provide the appellant with the procedural protections set forth at [5 U.S.C. § 7513\(b\)](#). ID at 9-10, 32. Accordingly, the AJ ordered the agency to cancel the suspension and retroactively restore the appellant, effective August 25, 2005, to December 9, 2006, with appropriate back pay and benefits. ID at 32-33. The AJ found, however, that the appellant failed to prove his affirmative defenses. ID at 10-32.

¶22 The agency has filed a PFR alleging that the AJ erred in finding that the Board has jurisdiction over this appeal and in failing to dismiss the appeal as untimely filed without good cause shown for the delay in filing. Petition for Review File (PFRF), Tab 1. The appellant has filed a cross PFR alleging that the AJ erred in finding that he failed to prove his affirmative defense of disability discrimination based on disparate treatment and failure to accommodate. PFRF, Tab 4. The appellant has also filed a response to the PFR, PFRF, Tab 6, and the agency has filed a response to the appellant's cross PFR. PFRF, Tab 7.

ANALYSIS

The Board lacks jurisdiction over this appeal.

¶23 An employee's absence for more than fourteen days that results in a loss of pay may be a constructive suspension appealable under [5 U.S.C. §§ 7512\(2\)](#) and [7513\(d\)](#). *Dones v. U.S. Postal Service*, [107 M.S.P.R. 235](#), ¶ 10 (2007). The dispositive question in determining whether a suspension took place is who initiated the absence; if the employee initiated the leave period, the absence is not a constructive suspension. *Id.*; *Alston v. Social Security Administration*, [95 M.S.P.R. 252](#), ¶ 11 (2003), *aff'd*, 134 F. App'x 440 (Fed. Cir. 2005). Conversely, if the absence is involuntary, i.e., at the direction of the agency, then the employee has been constructively suspended. *Sage v. Department of the Army*, [108 M.S.P.R. 398](#), ¶ 5 (2008). An employee who alleges that he was constructively suspended must prove by preponderant evidence that his absence was involuntary. *Dones*, [107 M.S.P.R. 235](#), ¶ 10; *Baker v. U.S. Postal Service*, [71 M.S.P.R. 680](#), 692 (1996); [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#).

¶24 Constructive suspension claims generally arise in two situations: (1) When an agency places an employee on enforced leave pending an inquiry into his ability to perform; or (2) when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Sage*, [108 M.S.P.R. 398](#), ¶ 5; *Hamiel v. U.S. Postal Service*, [104 M.S.P.R. 497](#), ¶ 4 (2007). In the latter situation, when an employee requests work within his medical restrictions, and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee, but fails to do so, his continued absence for over fourteen days constitutes an appealable constructive suspension. *Johnson v. U.S. Postal Service*, [110 M.S.P.R. 679](#), ¶ 9 (2009). Once an employee who was absent due to a medical condition makes a nonfrivolous allegation that he was able to work within certain restrictions, that he communicated his willingness to work, and that the agency prevented him from returning to work, the burden of production shifts to the

agency to show that there was no work available within the employee's restrictions, or that it offered such work to the employee and he declined it. *Id.*; *Baker*, 71 M.S.P.R. at 693. If the agency meets its burden, then the appellant must present sufficient rebuttal evidence to meet his overall burden of persuasion. *Johnson*, [110 M.S.P.R. 679](#), ¶ 9; *Baker*, 71 M.S.P.R. at 693.

¶25 The AJ found that the first situation described above is relevant here. *ID* at 8-9. Applying that standard, the AJ found that “[Mr.] Ravelle [sic] told the appellant that he could not return to work until he provided updated medical documentation showing a change in his limitations allowing him to perform the full range of his assigned duties as an Interpreter, and then placed him first in an LWOP status followed by AWOL” *ID* at 9. Based on these findings, the AJ concluded that the appellant had proven by preponderant evidence that the agency initiated his absence pending an inquiry into his ability to perform. *Id.* Therefore, the AJ found, the appellant had shown that the agency constructively suspended him from August 25, 2005, to his December 9, 2006 removal, and that the Board had jurisdiction over his claim. *Id.*

¶26 On PFR, the agency alleges that the AJ applied the wrong legal standard in analyzing the appellant’s constructive suspension claim. PFRF, Tab 1 at 15. In particular, the agency argues that the applicable scenario in this appeal is that in which an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Id.* at 16.

¶27 We agree. Here, the agency did not place the appellant on enforced leave pending an inquiry into his ability to perform. Instead, beginning on April 20, 2005, the appellant voluntarily absented himself from work for medical reasons at the direction of his treating physician, Removal IAF, Tab 6, Subtab 4aaa, and on June 14, 2005, he requested that the agency place him on LWOP. *Id.*, Subtab 4ww. On August 25, 2005, the appellant asked the agency to provide him a light duty position within the restrictions defined by Dr. Parry, and Mr. Revelle denied the appellant’s request. IAF, Tab 9, Exhibits B, C.

¶28 Under *Baker*, once the appellant communicated his willingness to work and the agency denied his request, the burden of production then shifted to the agency to show either that there was no work available within the appellant’s restrictions, or that it offered such work and the appellant declined it.² *Baker*, 71 M.S.P.R. at 693; see *Johnson*, [110 M.S.P.R. 679](#), ¶ 9.

¶29 Here, the record reflects that there was no work available within the appellant’s restrictions. At the hearing, Ms. Greer testified that there was no duty in the Court that the appellant could have performed within his medical restrictions. Hearing Transcript of December 4, 2008 at 63 (testimony of Ms. Greer). In addition, the agency presented un rebutted testimony that it conducted a search of available positions with the agency and concluded that there were no positions to which the appellant could be reassigned commensurate with his medical restrictions. *Id.* at 114, 160-61 (testimony of Human Resources Specialist Doreen Coker). Therefore, we find that the appellant’s absence does not constitute a constructive suspension and the Board thus lacks jurisdiction over this appeal. See *Baker*, 71 M.S.P.R. at 692-93 (the appellant’s absence did not constitute a constructive suspension because, though he requested work within his medical restrictions, there was no such work available for him to perform).

We do not address the issue of timeliness.

¶30 On review, the agency also alleges that the AJ erred in finding that the appellant “timely filed” this appeal. PFRF, Tab 1 at 20-23; ID at 1, 4. With exceptions not applicable here, “an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant’s receipt of the agency’s decision, whichever is later.”

² We assume, without deciding, that the agency is bound by policy, regulation, or contractual provision to offer available light duty work to the appellant. In that regard, we note that the agency on review “stipulates it has a duty to offer *available* light duty work to qualified individuals with a disability” PFRF, Tab 1 at 15 n.6.

[5 C.F.R. § 1201.22](#)(b). The Board will waive the time limit for filing an appeal if good cause for the delay is shown. [5 C.F.R. § 1201.22](#)(c). To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). In order to show good cause for the apparent untimely filing of an appeal, an appellant who was not provided a required notice of appeal rights is not required to show that he exercised due diligence in attempting to discover his appeal rights; the question is whether he was diligent in filing an appeal after he learned he could do so. *E.g.*, *Hamiel*, [104 M.S.P.R. 497](#), ¶ 8. This is the proper analysis of the timeliness issue in this appeal. However, in light of our finding that the Board does not have jurisdiction over this appeal, we need not reach the timeliness issue. *See, e.g.*, *Alston*, [95 M.S.P.R. 252](#), ¶ 19.

The appellant's cross PFR is denied.

¶31 As noted above, in his cross PFR, the appellant alleges that the AJ erred in finding that he failed to prove his affirmative defense of disability discrimination based on disparate treatment and failure to accommodate. PFRF, Tab 4. It is well settled that, absent an otherwise appealable action, the Board lacks jurisdiction over discrimination claims. *See Carlisle v. Department of Defense*, [93 M.S.P.R. 280](#), ¶ 9 (2003); *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), (allegations of discrimination are not an independent source of appellant jurisdiction, and an underlying appeal within the Board's jurisdiction must first be presented for such allegations to be considered), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982). Therefore, we deny the appellant's cross PFR.

¶32 Accordingly, we dismiss this appeal for lack of jurisdiction.

ORDER

¶33 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.ca9.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.